In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1128

PHILIP PEIZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiring with an employee of the Securities and Exchange Commission to defraud the United States, and of three substantive violations of the Securities Act of 1934. On January 9, 1970, he was sentenced to concurrent one year terms of imprisonment on each count, with all but three months suspended. A motion to set aside the verdict and for a judgment of acquittal was denied (Pet. 16a–18a); the court of appeals affirmed the conviction (Pet. 1a—13a).

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The evidence is summarized in the opinion of the court below (Pet. 2a–4a). In essence, it shows that in April 1967, petitioner, an attorney, obtained inside information from Murray B. Weiner, a branch chief of the Securities and Exchange Commission, that the Commission was about to file a lawsuit against Georgia-Pacific Corporation which could be expected to produce a rapid decline in the price of the corporation's stock. On April 7 and April 11, 1967, petitioner sold a total of 3,300 shares of Georgia-Pacific stock through three separate brokers, falsely representing that he or his mother then owned stock in the corporation. He made various excuses for not delivering the shares on the settlement dates. The Commission suit was announced on April 27 and the price of the stock consequently declined; petitioner was thereafter able to buy the stock with borrowed money, deliver it for settlement "and make a tidy profit" (Pet. 3a).

1. As part of the conspiracy, it was charged that petitioner would obtain confidential inside information about matters under consideration by the Securities and Exchange Commission, including action concerning the Georgia-Pacific Corporation (see Pet. 7). Although the focus at trial was basically on the investigation of the affairs of Georgia-Pacific, there was evidence that petitioner had previously obtained inside information from Weiner about two other corporations (Tr. 337–338). Under the trial court's instructions, the conspiracy charge was limited to the Georgia-Pacific transaction (Pet. 9). Petitioner argues that on appeal, the conviction was affirmed on the differ-

ent theory that there was a broader conspiracy involving information about other corporations as well as Georgia-Pacific. The opinion below does not support this reading. In rejecting the argument that the evidence was insufficient to sustain the conspiracy conviction, the court below simply treated the evidence of earlier dealings between petitioner and Weiner—and properly so—as one factor[1] tending to show that there was an agreement between them relating to the Georgia-Pacific incident (Pet. 5a).

2. In addition to the conspiracy count, petitioner was convicted of three other violations: two counts which charged willful violations of § 10(b) of the Securities Act of 1934, 15 U.S.C. 78j(b) and the Commission's Rule 10b–5 in that petitioner told two brokerage houses to sell Georgia-Pacific Corporation stock, misrepresenting that the sales were long rather than short; and another count which charged a willful violation of § 10(a) of the Securities Act, 15 U.S.C. 78j(a) and the Commission's Rule 10a–1(a) in that petitioner caused shares to be sold short in violation of the rule (Pet. App. 19a–20a). Although admitting that, in order to establish criminal liability,

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[1] These earlier dealings included the fact that in February 1968, Weiner had sexual relations with a girl supplied by petitioner. Petitioner told a government witness that he could sometime obtain the company of prostitutes whom he had defended in his law practice "for his friend in Washington" (Pet. 3a–4a).

There was also evidence of contacts between petitioner and Weiner concerning the stock after Weiner had provided the tip but before the institution of the lawsuit against Georgia-Pacific (see Pet. 16a).

the government was not required to prove that he knew of the rule which had been violated (Pet. 14, 15), petitioner argues that willfully "should be held to require proof of a specific intent to bring about a result which the statute or regulation is designed to prevent" in order to avoid criminal prosecution "for technical or innocuous violations" of the securities laws (Pet. 18).

In concluding that the government had met its burden on the issue of willfulness, the court of appeals held that the standard to be applied was "a realization on the defendant's part that he was doing a wrongful act," that "the act be wrongful under the securities laws and that the knowingly wrongful act involve a significant risk of effecting the violation that has occurred" (Pet. 12a-13a). Once it is admitted—as is the case here—that the government need not prove actual knowledge of the regulation, we fail to perceive any significant difference between the standard suggested by petitioner and that adopted by the court of appeals.

In any event, petitioner received identical concurrent sentences on all counts with no one offense supplying unique or aggravating circumstances likely in itself to have influenced the length of the sentence (one year on each count with all but three months suspended). The evidence introduced to prove the substantive violations would have been admissible at a separate trial on the conspiracy count. Accordingly, this case is appropriate for application of the concurrent sentence doctrine. See *e.g.*, *United States* v.

Bigham, 421 F. 2d 1344, 1346 (C.A. 5), certiorari denied, October 12, 1970, No. 140, this Term; *Braxton v. Maryland*, 395 U.S. 784.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1971.